INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	7
Conclusion	15

CITATIONS

Cases:

Cacy v. *United States*, 298 F. 2d 227	12
Cochran v. *United States*, 310 F. 2d 585	9
Costello v. *United States*, 350 U.S. 359	9
Dunn v. *United States*, 284 U.S. 390	11
Gorin v. *United States*, 313 F. 2d 641, certiorari denied, 374 U.S. 829	13
Johnson v. *United States*, 347 F. 2d 803	11
Kollish v. *United States*, 340 F. 2d 513, certiorari denied, 381 U.S. 951	12
Lanza v. *New York*, 370 U.S. 139	8
Lawn v. *United States*, 355 U.S. 339	9
Lopez v. *United States*, 373 U.S. 427	8
Olmstead v. *United States*, 277 U.S. 438	8
On Lee v. *United States*, 343 U.S. 747	8
Reichert v. *United States*, 359 F. 2d 278	11
Roberson v. *United States*, 282 F. 2d 648, certiorari denied, 364 U.S. 879	10
United States v. *American Stevedores, Inc.*, 310 F. 2d 47, certiorari denied, 371 U.S. 969	12
United States v. *Capello*, 327 F. 2d 378	12

236-193—66——1

Cases—Continued

	Page
United States, v. *D'Antonio* 362 F. 2d 151, certiorari denied, No. 394, Oct. 17, 1965	12
United States v. *Echeles*, 352 F. 2d 892	13
United States v. *Houlihan*, 332 F. 2d 8, certiorari denied, 379 U.S. 828	14
United States v. *Irwin*, 354 F. 2d 192, certiorari denied, 383 U.S. 967	10
United States v. *Kelly*, 349 F. 2d 720, certiorari denied, 384 U.S. 947	10
United States v. *Medlin*, 353 F. 2d 789, certiorari denied, 384 U.S. 973	12
United States v. *Osborn*, 350 F. 2d 497, certiorari granted, 382 U.S. 1023	8
United States v. *Owens*, 263 F. 2d 720	10
Statutes:	
18 U.S.C. 371	3
18 U.S.C. 1503	3
18 U.S.C. 1622	3
18 U.S.C. 3500	10

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 557

VINCENT PACELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 593

FRANCES KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 594

ISRAEL SCHAWARTZBERG

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1966. Petitions for rehearing on behalf of Kahn and Schawartzberg were denied on August 26, 1966. On August 12, 1966, Mr. Justice Harlan extended the time for filing Pacelli's petition for a writ of certiorari to September 16, 1966. Pacelli's petition was filed on September 15, 1966. The petitions of Kahn and Schawartzberg were filed on September 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that conversations between petitioner Kahn and government witness Hedges were recorded with the consent of Hedges warrants reversal of petitioners' convictions even though the recordings were not introduced at petitioners' trial.

2. Whether the court properly prevented defense counsel from inquiring into the details of criminal offenses committed by a prosecution witness.

3. Whether the jury's awareness of the fact that a large amount of material was turned over to defense counsel after a government witness' direct testimony prejudiced petitioners.

4. Whether the convictions of petitioners Kahn and Schawartzberg on a conspiracy count are affected by their acquittals on substantive charges.

5. Whether the prosecutor's closing remarks were improper.

6. Whether the court abused its discretion in refusing to grant motions for severance.

7. Whether the court properly denied the request of petitioner Pacelli, who had rested at the conclusion of the government's case, for instructions that evidence subsequently furnished by the codefendants should not be considered against him.

8. Whether various procedural errors were committed at petitioners' trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York petitioners were convicted of conspiring to obstruct justice and to suborn perjury in violation of 18 U.S.C. 371, 1503, and 1622. Petitioner Pacelli was also convicted on a substantive count of obstructing justice, in violation of 18 U.S.C. 1503. On March 30, 1966, each petitioner was sentenced to two years' imprisonment on the conspiracy count. Pacelli also received a two-year concurrent sentence on the substantive count. The court of appeals affirmed all the convictions.

The evidence showed that in March 1961, Charles Hedges was convicted in the United States District Court for the District of Connecticut of violating the narcotics laws and was sentenced to imprisonment for fifteen years and fined $10,000 (A. 57a, 188a, 442a).[2] Hedges had been represented by petitioner Kahn at his trial. He was unable to post $50,000 bail pending appeal, and was sent to the federal penitentiary in Lewisburg, Pennsylvania (A. 445a). In late June

[2] The record of trial, filed with the Clerk of this Court, includes the two-volume Appellants' Joint Appendix filed in the court of appeals ("A."), all papers filed in the district court, and the transcript of trial ("Tr.").

1962, Hedges was transferred to a detention center in New York City, where efforts were made to obtain his cooperation with the government (A. 59a). In early July, Hedges agreed to assist federal authorities in their investigation of the narcotics ring of which he had been a member (A. 60a, 167a–169a). Among those implicated by Hedges was petitioner Pacelli (A. 68a, 169a).

In July 1962, Hedges was transferred to Westchester County Jail, Valhalla, New York. On July 16 petitioner Kahn made the first of more than thirty visits to Hedges. At his request, Miss Kahn filed a motion with the district court to reduce his bail pending appeal to $25,000 (A. 61a–62a). On July 20, 1962, Pacelli visited Hedges' former wife and gave her $500 to use for herself and her five children. Pacelli learned from Mrs. Hedges that Miss Kahn was the attorney for Hedges (A. 311a). Mrs. Hedges also relayed Hedges' message that Pacelli ought to "leave town" (A. 310a). Pacelli professed ignorance of the reason for Hedges' admonition (A. 310–311a).

On July 30, 1962, petitioner Schawartzberg, Miss Kahn's clerk met with Hedges' fiancee, Patricia Curtin, and gave her $3,000, which he said had been received from Pacelli for use as collateral for Hedges' bail (A. 314a–316a). On August 1, 1962, Miss Curtin was able to secure the remaining collateral required to obtain Hedges' release (A. 356a–357a). Later that month Hedges went to Miss Kahn's office, where Schawartzberg handed him a prepared affidavit which declared that Pacelli and two others were not involved

in the narcotics ring. At Schawartzberg's urging, Hedges signed the affidavit (A. 80a–81a).[2]

In mid-December 1962, Hedges was seriously injured, and was treated in the prison ward of a Kings County hospital. Schawartzberg made several attempts to communicate with Patricia (Curtin) Hedges,[3] and tried unsuccessfully to retrieve the $3,000 he had given her (A. 317a). On January 9, 1963, Schawartzberg called Mrs. Hedges and arranged to meet her later that day in the lobby of the office building in which she worked. She alerted the Bureau of Narcotics, which arranged to have two agents maintain a surveillance of the meeting (A. 319a).

Petitioner Pacelli accompanied Schawartzberg to the meeting, and was introduced to Patricia Hedges by Schawartzberg (A. 320a). Pacelli maintained that he was Hedges' friend, and wanted to help Hedges. He stated that he had in the past advised Hedges to "take off," but Hedges "didn't have enough sense to listen to him." Pacelli then offered to give Mr. and Mrs. Hedges as much money as they needed to "go away * * * pending the appeal, and we could even stay away after the appeal" (A. 288a, 291a, 320a). Pacelli requested that Patricia obtain an answer from Hedges within a few days.

On January 14, 1963, Schawartzberg telephoned Patricia to determine if she had relayed Pacelli's offer to Hedges and advised her that Miss Kahn would soon visit Hedges (A. 323a). Two days later

[2] In November 1962, Schawartzberg destroyed the affidavit in Hedges' presence (A. 81a–82a).

[3] Hedges married Patricia Curtin in September 1962.

Miss Kahn saw Hedges in the hospital and asked him what he intended to do. Hedges replied, "Tell them to run. * * * I'm finished with all of them." Miss Kahn remarked, "I don't think that's like you. You wouldn't do anything like that" (A. 73a). Thereafter, Hedges was returned to Westchester County Jail to serve the remainder of his sentence. During Miss Kahn's frequent visits to him, she invariably discussed Hedges' intentions to cooperate with the government and would comment, "This is not like you to do anything like this. You're too much of a man" (A. 82a–83a).

Hedges' conviction was affirmed on March 31, 1963. However, a subsequent motion to reduce the sentence, filed by Miss Kahn, was granted on May 15, 1963, resulting in the elimination of the fine and a reduction to five years' imprisonment (A. 232a). No further relief was sought, and Hedges served the remainder of his term in the Westchester prison, until his release on May 19, 1965 (A. 77a–78a). Miss Kahn continued to visit him and to discuss his decision to assist the government. In September 1963, she told Hedges that Pacelli would lend him $25,000 if he agreed not to testify, and that he would have complete protection (A. 90a). In October 1963, Miss Kahn indicated to Hedges that she had attended a meeting with Pacelli and others and that she heard them agree to guarantee Hedges' safety and the $25,000 (A. 94a–97a).

In November, 1963, Hedges was taken to the court house to identify an individual involved in the nar-

cotics ring. The next day Miss Kahn visited Hedges and asked him whether he had been able to make the identification. She was delighted when Hedges stated that he did not identify the individual (A. 113a–114a).

In June 1964, Hedges testified before the grand jury. He did not tell Miss Kahn that he had done so. In July she suggested that if he was called before the grand jury, he should push back the dates of his dealings in narcotics so that the prosecution of others would be barred by the statute of limitations. She continued to urge Hedges not to testify, and suggested that, if he feigned insanity, the government would not summon him before the grand jury (A. 102a–106a, 127a–129a). Hedges testified before the grand jury in September 1964, again without disclosing that fact to Kahn. Shortly before and after this second appearance, Miss Kahn continually emphasized the importance of limiting his testimony to dates beyond the statute of limitations. She also expressed regret that Hedges was about to "destroy" himself and would be "picked apart" as a witness in a crowded courtroom (A. 139a–141a). On September 30, 1964, Pacelli and others were indicted for violations of the narcotics law. Hedges testified for the prosecution at Pacelli's trial in May 1965 (A. 142a; 363 F. 2d 385 (C.A. 2)).

ARGUMENT

1. At three of the interviews between petitioner Kahn and Hedges in the Westchester County Jail electronic equipment was used, with the consent of

Hedges, to record the conversations. Miss Kahn, who was aware that in the past the prison authorities had eavesdropped upon conversations between prisoners and visitors, habitually carried a transistor radio, which she turned on at a high volume whenever she conversed with a prisoner (A. 100a, 115a–116a, 475a–476a). The resulting tapes were hardly intelligible because of the noise of the radio. Although petitioners' pre-trial motions to suppress these tapes were denied (Motion to Supress, A. 20a–63a, 251 F. Supp. 702), the prosecution elected not to introduce the recordings at trial, and the jury was not told of their existence.[4] Petitioners nonetheless attack the electronic recordings in this Court (Kahn Pet. 11–17, 25, 27–28, 35–47; Pacelli Pet. 16; Schawartzberg Pet. 13–16). Petitioners' major challenge is directed at the alleged violation of the sancity of discussions between attorney Kahn and her client, witness Hedges. Whether or not Miss Kahn continued to serve as Hedges' attorney after his sentence was reduced,[5] the attorney-client privilege is a protection for the client,

[4] Because these tapes were never used in evidence, this case differs materially from *United States* v. *Osborn*, 350 F. 2d 497 (C.A. 6), certiorari granted, 382 U.S. 1023. Accordingly, a decision in the instant case need not await the decision in *Osborn*. In addition, there is no occasion to reconsider this Court's decisions in *Olmstead* v. *United States*, 277 U.S. 438, 455; *On Lee* v. *United States*, 343 U.S. 747; *Lopez* v. *United States*, 373 U.S. 427; and *Lanza* v. *New York*, 370 U.S. 139.

[5] Hedges said that he did not consider Miss Kahn to be his attorney after his sentence was reduced. However, he did not communicate his feelings to her nor did he formally discharge her.

and may be waived by him. Hedges voluntarily communicated the contents of the conversations to the government and chose to permit them to be recorded.

Petitioners further allege that the indictment should have been dismissed because the tapes might have been played before the grand jury. Even assuming, *arguendo,* that the recordings were incompetent evidence, petitioners, who had access to the transcripts of the grand jury testimony of Charles and Patricia Hedges, have not shown that there was no relevant or competent evidence upon which to sustain the indictment. See *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339; *Cochran* v. *United States,* 310 F. 2d 585, 590 (C.A. 8).

2. During the cross-examination of Hedges, testimony was elicited that, at the time of his arrest, he had on his person $1,500 which he had stolen (A. 218a). When asked for further details of the crime, Hedges invoked his privilege against self-incrimination. The court sustained Hedges' position despite counsel's assertion that further inquiry into the facts surrounding the collaterial crime would affect the credibility of the witness (A. 219a–221a). Petitioner Schawartzberg, who represented himself, renewed this line of questioning during his cross-examination, but the court barred him from inquiring into the details of prior crimes committed by Hedges (A. 270a–272a). Petitioner Kahn, citing no cases in support of her position, alleges that the trial court abused its discretion in sustaining the claim of privilege (Kahn Pet. 24–25). To the contrary, the offenses committed by

the witness were purely collateral. The only legitimate matter bearing on his credibility under established rules of evidence was whether he had been convicted of these offenses, and any exploration of the details of the crimes would have involved a tangential inquiry in an already lengthy trial. *United States* v. *Irwin*, 354 F. 2d 192, 198 (C.A. 2), certiorari denied, 383 U.S. 967; *United States* v. *Kelly*, 349 F. 2d 720 (C.A. 2), certiorari denied, 384 U.S. 947; *United States* v. *Owens*, 263 F. 2d 720 (C.A. 2).

3. Following the direct examination of Hedges, defense counsel moved under 18 U.S.C. 3500 for the production of all writings dealing with that witness' testimony. As the prosecution began to identify the notes he was handing over, defense counsel asked the court whether "this should be done out of the presence of the jury?" The trial judge replied that he did not think it necessary to remove the jury (A. 148a). The identification continued, following which the court called a recess so that defense counsel could read the material (A. 149a–155a). Counsel at trial made no further comment on the procedure. Petitioners now assert that defense counsel's suggestion was a "timely objection" and contend that it was error for the court to allow the jury to be present when the material was identified.

This belated contention lacks merit. *Roberson* v. *United States*, 282 F. 2d 648 (C.A. 6), certiorari denied, 364 U.S. 879. The court did not abuse its discretion in allowing the jury to observe the identification of the material. The trial judge noted that the

jury was apprised of the purpose of the identification (A. 148a). Later the court advised the jury that the notes turned over to the defense were not evidence (A. 679a–680a). These instructions, coupled with an admonition that the jury was to consider only the facts developed at the trial, in view of the lack of request by experienced defense counsel for further instructions regarding the incident, were sufficient to protect petitioners. The cases relied upon by petitioner (*Johnson* v. *United States*, 347 F. 2d 803 (C.A.D.C.); *Reichert* v. *United States*, 359 F. 2d 278 (C.A.D.C.)) held that it was error for the prosecutor to argue in his summation that, in light of the failure of defense counsel to impeach the witness, the material given to him must have corroborated the testimony of the witness. No such comment was made in the instant case.

4. The indictment contained seven counts (A. 11a–17a). All petitioners were convicted on the conspiracy count. Of the six substantive counts, two were dismissed by the trial judge (A. 425a). Petitioner Kahn, named in two others, was acquitted on both. Petitioner Schawartzberg was named in two counts, one of them jointly with Pacelli. Schawartzberg was acquitted; Pacelli convicted. Petitioners Kahn and Schawartzberg now argue that they must be acquitted on the conspiracy count because of their acquittal of the substantive offenses. Inconsistency in a jury verdict does not, however, vitiate any portion of that verdict. *Dunn* v. *United States*, 284

U.S. 390; *Koolish* v. *United States,* 340 F. 2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *United States* v. *Capello,* 327 F. 2d 378 (C.A. 2); *United States* v. *American Stevedores, Inc.,* 310 F. 2d 47 (C.A. 2), certiorari denied, 371 U.S. 969; *Cacy* v. *United States,* 298 F. 2d 227 (C.A. 9).

5. Petitioners' challenges to the prosecutor's summation are without substance. Those comments were not challenged at trial by petitioner Kahn's experienced counsel. See *United States* v. *Medlin,* 353 F. 2d 789 (C.A. 6), certiorari denied, 384 U.S. 973. The isolated remark now attacked by Kahn (Kahn Pet. 25) was ordered stricken by the judge. The prosecutor commented "With regard to this question of whether or not Hedges ever mentioned the $25,000 bribe to her, do your have any way of knowing whether or not had she denied that the Government could have proved it otherwise." The judge ordered the remark stricken, declaring, "I don't understand that last remark, but I will strike it out" (A. 575a). Petitioners also challenge the closing remark of the trial counsel that, as an advocate, he believed that the evidence justified convictions. This qualified expression of belief, which did not suggest that it was supported by proof other than the evidence adduced in open court, presents no ground for reversal. *United States* v. *Medlin, supra,* 353 F. 2d at 796; *United States* v. *D'Antonio,* 362 F. 2d 151 (C.A. 7), certiorari denied, No. 394, October 17, 1966. Nor was it improper for government counsel to object to petitioner Schawartzberg's attempt, during the sum-

mation which he delivered as counsel *pro se,* to get before the jury his version of the facts. Having chosen not to take the stand and be subjected to cross-examination, it was obviously improper for Schawartzberg to attempt to testify in his role as attorney for himself.

6. Petitioners Kahn and Schawartzberg allege that the court abused its discretion in denying their motions for a severance. They claim that in a separate trial Schawartzberg could have given exculpatory evidence for Miss Kahn while maintaining his right not to answer questions about the crime charged, whereas in a joint trial he would waive his privilege against self-incrimination if he testified at all. Obviously the failure to sever on this ground did not prejudice Schawartzberg. Nor has petitioner Kahn ever specified what kind of testimony was to be elicited from Schawartzberg, and whether it was actually exculpatory rather than collateral. Under these circumstances there was no abuse of discretion in rejecting the motions for severance on the purely hypothetical ground now being urged, *Gorin* v. *United States,* 313 F. 2d 641, 645–646 (C.A. 1), certiorari denied, 374 U.S. 829. The decision in *United States* v. *Echeles,* 352 F. 2d 892 (C.A. 7), cited by petitioners, is inapposite. In that case the refusal to sever was held to be an abuse of discretion because the co-defendant had on three different occasions, in open court, given testimony supporting Echeles' innocence.

7. Pacelli's claim that, after he rested, the court should have instructed the jury not to consider sub-

sequent defense testimony against him is without merit. The government's evidence both directly and circumstantially connected Pacelli with the conspiracy, and petitioner has pointed to no particular defense testimony which, in any way, "strengthened the Government's case against Pacelli" (Pet. 12). Of the three defendants, only petitioner Kahn elected to testify, and her defense was a denial that she had ever urged Hedges to commit an illegal act (A. 480a). Her testimony did not introduce new evidence of Pacelli's guilt. The trial judge safeguarded Pacelli by his instructions to consider the evidence separately as to each defendant and render a separate verdict as to each on the conspiracy as well as the substantive counts (A. 601a, 624a). See *United States* v. *Houlihan,* 332 F. 2d 8, 15 (C.A. 2), certiorari denied, 379 U.S. 828. The mere fact that Pacelli's counsel did not agree with the line of defense taken by a co-defendant did not entitle him either to a severance or to a special instruction. And petitioner's claim of prejudice, reduced to its essentials, is simply that his co-defendants assumed an unwise posture before the jury.

8. There is no substance whatever to the various remaining contentions made by petitioners Kahn and Schawartzberg. The claim that a speedy trial was denied ignores the fact that only three months elapsed between arrest and trial. During that short period of time Schawartzberg and Miss Kahn submitted almost two dozen motions for pretrial relief on which several hearings were conducted and a number of written opinions and orders were filed (A. 1a–7a).

Nor was there unconscionable or intentional pre-arrest delay. There is no requirement that the government arrest an individual as soon as it has probable cause to believe he committed a criminal offense, and there is no basis here for any claim that petitioners were prejudiced by the alleged pre-arrest delay.

There is no merit to Schawartzberg's claim that the narcotics officer to whom Patricia Hedges gave the memoranda of her conversations with Schawartzberg should have been produced. This agent never observed any meetings between the parties. The court determined that all such memoranda were in the government's possession and had been given to defense counsel after Mrs. Hedges' direct testimony (A. 321a, 323a, 378a–379a, 382a, Tr. 1004, 1056, 1126–1127). Since all material was turned over, there was no need to conduct a *voir dire* examination on this issue. Cases cited by Schawartzberg dealing with statements not turned over to the defense are inapposite.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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